

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL KESTNER, et al.,

Defendants.

Civil Action No. 3:18-01289

JUDGE CAMPBELL

MAGISTRATE JUDGE NEWBERN

Jury trial

DECLARATION OF PHILIP BANGLE

I, Philip Bangle, declare as follows:

1. I am competent to testify to the matters set forth herein, and I testify on personal knowledge, information, and belief.
2. I am an attorney in good standing, admitted to the Bar of this Court and the Tennessee Supreme Court.
3. I am an Assistant Attorney General with the Office of the Tennessee Attorney General.
4. I am trial counsel for the State of Tennessee in a civil fraud case against Pain MD, LLC, MedManagement, Inc., Michael Kestner, Dr. Lisabeth Williams, and other related entities pursuing violations of the Tennessee Medicaid False Claims Act, Tenn. Code Ann. §§ 71-5-181 to -185. *State of Tennessee v. Pain MD, LLC et al.*, C.A. No. 2017-262 (Williamson Cnty. Cir. Ct.).
5. In that case, the court ordered defendants Pain MD and MedManagement to produce medical and certain business records in its storage facilities. (Att. 1, 5/30/2019 Order).
6. I became aware that Pain MD's Chapter 7 trustee in its bankruptcy case sent letters to each of Pain MD's storage facilities. I asked the trustee for copies of those letters on July 25, 2019, and he provided them the following day.
7. The language he used in those letters about disposal of the records caused me concern, so I immediately called the storage facilities on the telephone and was able to make contact with all of them.
8. My intention was to determine 1) whether any of the storage facilities had destroyed any records, 2) when Pain MD paid its last bill, and 3) how many boxes of records were at each facility.
9. Additionally, the State has sent each of the storage facilities a letter advising them to consult an attorney regarding their obligations under the Automatic Stay in bankruptcy (Att. 2, 4/12/2019 Gaske letter).

10. On August 1, 2019, I spoke with Eva Westacott, an employee at Secure Storage Solutions in Lawrenceburg, Tennessee. She said she was glad she received my call, because, "We were going to have someone burn it today."

11. As of August 14, 2019, she has agreed to move the records out of the storage units and into another secure, locked location at Secure Storage Solutions' main office building for the time being.

12. On August 7, 2019, I spoke with Barbara Allen, an employee at Stowaway Storage in Kingsport, Tennessee. She told me there were 209 legal-sized boxes of records. She said that 33 of the 209 were in filing cabinets and not actually in boxes, but "by the box" is the unit Shred-It uses to estimate the cost of shredding documents. In an earlier telephone conversation with Ms. Allen, on August 1, 2019, she told me she had planned to call Shred-It and wanted to also call the trustee to see if he would pay the cost for shredding the records.

13. After I spoke with her, she has agreed not to have the records shred for the time being.

14. I do not believe, based solely on my telephone conversations with personnel at the storage facilities, that any facilities have yet destroyed any of the records for the time being, but I do not know for how long. The storage facilities are not being paid, and many cannot re-let their units.

15. Pain MD ceased payments to its storage facilities as of June 1, 2019, the day after the court's May 30, 2019 order granting the State entry to Pain MD's storage facilities for purposes of inspection and copying records.

16. At a hearing on August 1, 2019, I made the court and counsel for all defendants aware of the danger of imminent destruction of the records in Pain MD's storage facilities.

17. I also put counsel for Pain MD, MedManagement, and Michael Kestner on notice of the danger of imminent destruction of its records in an August 13, 2019 email, stating:

Thank you for your email clarifying your position regarding your obligation to comply with the Court's May 30, 2019 Order. The May 30 Order addresses two categories of items that we understand are in storage facilities: (1) medical records for self-pay patients; and (2) documents pertaining to needle purchases. It is our understanding that Pain MD quit paying for the storage facilities as of June 1, 2019. These business records and medical records are in danger of imminent destruction. We put Pain MD and MMi on notice of this danger at the August 1, 2019 hearing before the Court. Similarly, I believe the United States also made you aware of this danger by email yesterday.

(Att. 3, 8/13/2019 Bangle email).

I declare under penalty of perjury under the laws of the United States and the State of Tennessee that the foregoing statements are true and correct to the best of my information, knowledge, and belief.

*Sworn to and subscribed
before me this 19th day
of August, 2019.*



Philip Bangle
Philip Bangle

Assistant Attorney General

Office of the Tennessee Attorney General

Attachment 1

RECEIVED BY
Judges' Chambers

Date:

5-30-19

FILED
WILLIAMSON COUNTY
CIRCUIT COURT

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

2019 MAY 29 PM 4:02

ENTERED 5-30-19

STATE OF TENNESSEE,

Plaintiff,

v.

PAIN MD, LLC, MEDMANAGEMENT, INC., MID-
SOUTH PAIN MANAGEMENT, P.C., CUMBERLAND
BACK PAIN CLINIC, P.C., LEBANON BACK PAIN
CLINIC, P.C., MICHAEL KESTNER, and LISABETH
WILLIAMS née SMOLENSKI,

Defendants.

Civil Action No. 2017-262

Judge Woodruff

Jury Demand

ORDER

THE COURT, having considered the Plaintiff State of Tennessee's motion to compel discovery (5/9/2019 Docket Entry), and for good cause shown, hereby GRANTS the motion and orders Pain MD, LLC and MedManagement, Inc., within five days of entry of this Order, to:

- 1) Produce Dr. Williams' patient medical records for patients Dr. Williams treated in Virginia from 2017-2018;
- 2) Produce Amy Self's emails up to May 30, 2017 subject to the terms of the Court's April 15, 2019 Order;
- 3) Provide the State with the address(es) of the location(s) of all facilities that might contain any document relating to the purchase of all needles used to perform any injection at any Pain MD, LLC or MedManagement, Inc. clinic and thereafter permit the State to enter such facilities for the purpose of inspecting and copying records;

- 4) Provide the State with the address(es) of the location(s) of all facilities that might contain any self-pay patient records for any Pain MD, LLC or MedManagement, Inc. clinic or provider and thereafter permit the State to enter such facilities for the purpose of inspecting and copying records; and
- 5) Produce to the State's eDiscovery vendor, currently Legility, temporarily for the purpose of imaging, every mobile phone paid for by Pain MD, LLC or MedManagement, Inc. since May 30, 2017. The State shall thereafter have access to review the contents within the scope of its discovery requests subject to the terms of the Court's April 15, 2019 Order.

THE COURT FURTHER ORDERS that the above Order compelling discovery is stayed pending further order of the Court subject to briefing about whether any of the documents above are subject to the protections provided by the Fifth Amendment to the United States Constitution and any similar protections provided under the Tennessee State Constitution. Briefing shall be on the following schedule:

- 1) Michael Kestner, Pain MD, LLC, and MedManagement, Inc. shall file and serve their brief on or before June 6, 2019. The Defendants' brief may be filed under seal, but Defendants shall deliver a copy to chambers.
- 2) The State of Tennessee's responsive brief, if it chooses to respond, shall be filed and served on June 13, 2019. If the Defendants' brief is filed under seal, the State of Tennessee shall file its responsive brief under seal and shall deliver a copy to chambers.

IT IS SO ORDERED, this 30 day of May, 2019.


JOSEPH A. WOODRUFF, Circuit Judge

APPROVED FOR ENTRY

RByl May 28, 2019

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Philip Bangle
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ATTACHMENT 2

STATE OF TENNESSEE

Office of the Attorney General



HERBERT H. SLATERY III
ATTORNEY GENERAL AND REPORTER

P.O. BOX 20207, NASHVILLE, TN 37202
TELEPHONE (615)741-3491
FACSIMILE (615)741-2009

August 12, 2019

All American Storage
Units #132, #134
2005 Fisk Road
Cookeville, TN 38501

Re: ***In re Pain MD, LLC, Bankr. M.D. Tenn. Case No. 19-00016***

Dear Sir or Madam,

You may be in receipt of a letter dated June 25, 2019, from David G. Rogers, Chapter 7 Bankruptcy Trustee ("Trustee") for Pain MD, LLC, Case No. 19-03841 in the United States Bankruptcy Court for the Middle District of Tennessee. That letter indicated that your storage facility may house records that contain sensitive medical information and that "[y]ou should consult an attorney as to your responsibilities as to disposal of same."

The Trustee has since filed a July 26, 2019, Motion to Abandon Medical Records (attached). On August 2, 2019, United States Bankruptcy Judge Randal S. Mashburn ordered that a hearing would be held on this Motion at 9:00 a.m. on August 27, 2019, in Courtroom One, Customs House, 701 Broadway, Nashville, Tennessee.

Since June 25, 2019, the Office of the Attorney General has received credible information indicating that such records were at risk of imminent destruction prior to the Bankruptcy Court's August 27, 2019, scheduled hearing.

The Office of the Attorney General wishes to maintain these records in their current state to protect patient confidentiality and preserve evidence. Thus, you should consult an attorney regarding your responsibilities under the Bankruptcy Code's automatic stay.

Please have your attorney contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Gaske". The signature is fluid and cursive, with the first name "Matthew" being more prominent than the last name "Gaske".

Matthew R. Gaske
Assistant Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 253-6121

ATTACHMENT 3

Philip Bangle

From: Philip Bangle
Sent: Tuesday, August 13, 2019 4:29 PM
To: John Nefflen
Cc: Jay Bowen; Lauren Kilgore; David Rogers; 'Bob Mendes'; Steve Jobe; Matthew R. Gaske
Subject: RE: Pain MD / State of Tennessee

John – Thank you for your email clarifying your position regarding your obligation to comply with the Court’s May 30 Order. The May 30 Order addresses two categories of items that we understand are in storage facilities: (1) medical records for self-pay patients; and (2) documents pertaining to needle purchases. It is our understanding that Pain MD quit paying for the storage facilities as of June 1, 2019. These business records and medical records are in danger of destruction. We put Pain MD and MMi on notice of this danger at the August 1 hearing before the Court. Similarly, I believe the United States also made you aware of this danger by email yesterday.

In addition, however, the May 30 Order addresses three other categories of items that, to our understanding, are not in storage facilities: (1) copies of Amy Self’s emails, which we understand Shackelford Bowen already prepared for production to us several months ago by placing them on a USB drive; (2) copies of Dr. Williams’ Virginia patient medical records from 2017-2018, which we understand Shackelford Bowen already prepared for production to us several months ago by placing them on a USB drive; and (3) Pain MD’s and MMi’s mobile phones, which the Court ordered produced temporarily to the State’s eDiscovery vendor for the purpose of imaging, after which they would be returned.

We have spoken with the Trustee, David Rogers, about these three categories of items. It is our understanding that David does not have any of these items. It is our further understanding that these items are not part of the bankruptcy estate and producing them—as the May 30 Order requires—will not interfere with the administration of the estate. David, can you confirm?

Lastly, although you state that you will have to wait until the August 27 hearing on the Trustee’s motion “for further instruction from the bankruptcy court” before you can release any documents in your possession, we note that the motion pertains to “pre-2014 PainMD medical records in multiple storage units in North Carolina, Tennessee and Virginia.” The motion does not address the USB drives, the mobile phones, or the documents pertaining to needle purchases.

Philip Bangle
Assistant Attorney General
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3054

From: John Nefflen <jnefflen@shackelford.law>
Sent: Tuesday, August 13, 2019 10:37 AM
To: Philip Bangle <Philip.Bangle@ag.tn.gov>
Cc: Jay Bowen <JBowen@Shackelford.law>; Lauren Kilgore <LKilgore@Shackelford.law>; David Rogers <dgrtrustee@comcast.net>; 'Bob Mendes' <bmendes@waypointlaw.com>
Subject: Pain MD / State of Tennessee

Philip,

As you know, we have filed a motion to withdraw as counsel for Pain MD and MMI. As a result of Pain MD's bankruptcy, the items listed in the Court's May 30, 2019 Order are part of the bankruptcy estate and are in the control of the Trustee, David Rogers (copied). We have advised Pain MD and MMI of the need preserve all documents. However, those entities are without funds and are no longer in business. We have also advised the Trustee and Pain MD's bankruptcy counsel, Bob Mendes (copied), of the ongoing litigation and the need to preserve documents. We will have to wait until the August 27 hearing on the Trustee's Motion for further instruction from the bankruptcy court before we can release any documents in our possession. Please give me a call if you would like to further discuss this matter.

John P. Nefflen, Esq.
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